In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES,
Appellant,

vs.

ALEXANDER MURPHY & Co.,
Appellees.

Brief for importers, appellees, in opposition to application for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit.

By way of introduction to this brief memorandum in opposition to the application for a writ of *certiorari* in this case, it is deemed proper to mention the fact not referred to in the moving papers, that the precise question involved in this case has been considered and decided adversely to the United States by the Circuit Court of Appeals for the Seventh Circuit, in the case of U. S. vs. Field, 34 U. S. App., 452. It is, therefore, sought by the Attorney-General to reargue in this Court a question upon which the Circuit Court of Appeals of two different circuits, have adopted the same view.

The Record: The record is entirely full and complete and open to no objection. The petition necessarily de-

scribed the appellants in the same terms as the decision and the entry. But the status of the importers fully appeared in the proceedings below, and reference to the stipulation (fols. 58-63), the assignment of errors (fols. 85, 86), the Attorney-General's notice of appeal (fol. 95) and the citation (fol. 100) will show the full names of the parties composing appellees' firm.

Three grounds are assigned for the application for this writ, viz.:

1st. The amount involved.

2d. The contention that the construction of the statute adopted by the Court of Appeals fails to effectuate the intent of Congress.

3d. The suggestion that the so-called Dingley Act of May 9th, 1890, is still unrepealed and in force.

I. The amount involved.

This argument has for some time past, we have observed, been made to do duty in substantially every brief filed in this Court, on behalf of the Government, in a tariff controversy. It seems a strange argument and one that should and would have little weight with this Court, and ordinarily no reply to it would be deemed necessary or proper. But, perhaps, this case affords as good an opportunity as any for calling attention to the logical consequences to which the policy of the executive branch of the Government on this subject seems inevitably to lead.

The period covered by the controversy as to the true construction of paragraph 297 of the Tariff Act was of only four months' duration, viz., from August 28th, 1894, to January 1st, 1895. The duties in dispute are those exacted in excess of the rates fixed by the present tariff on worsted goods imported or withdrawn

from warehouse during this brief period, and it can be fairly assumed that, in view of the construction of the law adopted by the Treasury Department, no goods were entered for consumption during this period which the importers could possibly do without until after January 1st, 1895. We are now informed on the authority of the Secretary of the Treasury that during this very brief period he caused to be collected in excess of the amount adjudged by two Circuit Courts of Appeals to be lawful nearly three hundred and fifty thousand dollars, *and the amount of the exaction is assigned as a reason for asking to have the case brought here.*

This case affords an excellent exemplification of the proposition which we now submit with great respect to the Court, viz., that, *if the largeness of the amount involved is to be regarded as a ground* for the bringing of revenue cases to this court by writ of *certiorari, practically every revenue case will have to come here,* as the amount involved is large in almost every instance. In the case of a continuing provision of the Tariff Law a year and a half is about the shortest time in which a test case can be carried through the Circuit Court of Appeals; and, as the higher duty is uniformly collected by the Treasury Department during the contest, a very large sum has been piled up by the time the Court of Appeals has decided the case, and then the largeness of the amount adjudged by that Court to have been illegally exacted is urged upon this Court as a reason for bringing the case here for review. In other words, *if the "amount" argument is to be allowed to prevail, the Courts of Appeals will cease to be final tribunals in revenue cases, as the statute has made them, and all this class of cases will have to come to this Court.* We submit, with great deference and respect, that, if this change in our judicial system is deemed necessary or desirable, it should be effectuated by legislation, and not by the exercise of the discretionary power of this Court to issue writs of *certiorari.*

Indeed, it may not be improper to suggest in this

connection (though not strictly material to the present application) that a disposition has been shown by the Attorney-General in the past few years to use the amount involved not only as a pretext for getting to this Court, but as an argument why the cases should be decided in his favor after they get here. And if that theory be carried to its logical conclusion it is a little difficult to see why the time of the Courts should be taken up with these matters at all, and why the Treasury Department should not be allowed to take any amount of money from an importer that it sees fit, and keep it forever.

As will be shown later on, *there was not the slightest excuse for making these exactions in the first instance*, for the Secretary of the Treasury had had his attention called by the Attorney-General (see 21 Op. Att.-Gen. 66, printed as an appendix to this brief) to decisions of this Court, which, in the plainest and most unequivocal language, negatived his right to take these higher duties. *Can the Executive ignore the decisions of this Court in order to collect a large sum in excessive duties, and then ask this Court to consider the largeness of the sum collected as a reason for exercising its discretion in his favor ?*

II. The intent of Congress.

In his opinion referred to above (21 Op. Att.-Gen. 66, see Appendix) the Attorney-General thus advised the Secretary of the Treasury :

> " Moreover, the phrase ' manufactures of wool ' has been given a very restricted meaning in prior tariff acts (Elliott vs. Swartwout, 10 Peters, 137 ; Seeberger vs. Cahn, 137 U. S., 95), and *there is a presumption in the absence of anything to the contrary that Congress intended it still to have the same signification* (Maddock vs. Magone, 152 U. S., 368, 371, 372)."

Now what was the restricted meaning which the Secretary of the Treasury was thus advised, was the signification which, it must be presumed, Congress intended it still to have.

We find it thus in Elliott vs. Swartout, 10 Peters, 137:

> "It being admitted, in this case, that *worsted is a distinct article*, well known in commerce under that denomination, we must understand Congress as using the term in that commercial sense, and as contradistinguished from wool and woolen goods, and other well known denominations of goods.
>
> "If, because worsted is made of wool, all manufactures of worsted become woolen manufactures, there would be no propriety in enumerating worsted goods as a distinct class."

And in Seeberger vs. Cahn (137 U. S., 95):

> "It being distinctly found, as a matter of fact, that the goods in question are called or known in the trade as 'worsteds,' and are composed mainly of worsted, but mixed with a small proportion of shoddy and of cotton, the Circuit Court rightly held that *they were subject to duty as manufactures of worsted, and not as manufactures of wool.*"

Upon what ground is this Court now asked to hold that Congress could not have intended the phrase "manufactures of wool," in paragraph 297, to have the same meaning which this Court had decided it to have, but must have intended it to mean what this Court had said it did not mean?

Why, the Attorney-General tells us (p.):

> "The only possible reason for postponing the reduction of duties on woolen goods was the injustice which manufacturers of these goods would suffer in case they had already laid in a large stock of raw material, which they still had on hand. It must, therefore, be presumed that Congress, while deliberating upon the new tariff

bill, had ascertained that woolen manufacturers were carrying a stock of raw material which equitably they should be allowed a few months' time to work off.

"This court can take judicial notice of facts generally known. It is generally known that manufacturers of wool were carrying such a stock, so that it would have been inequitable to put the new duties on manufactures of wool directly into operation."

Is it seriously supposed that this Court can take judicial notice of the alleged fact that on August 28th, 1894, manufacturers of woolen and worsted goods had just enough goods on hand to last four months?

The Attorney-General seems to feel called upon for an apology for his "inequitable" action in not giving the manufacturers of *hair* goods a few months' time to work off their stock, and he says:

"It may be asked why hair goods were not similarly treated, but *there may not have been such a stock of imported hair on hand.*"

Of this, also, is the Court to take judicial notice?

The question here is not what Congress might, could or should have done, but what it *did.* It used plain language which had been construed by this Court. The speculation as to its motives which the Court is now asked to enter upon is aptly referred to in the decision of the Court in Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden vs. Collector, 5 Wall., 107, 111, '*what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing,* upon which all sorts of opinions, each

> variant from the other, may be formed by different persons. *It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes.* 'Where the language of the act is explicit,' this Court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature. * * * *It is not for the Court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions'* (Scott vs. Reid, 10 Pet., 524, 527)."

The Attorney-General quotes from numerous dictionaries and encyclopædias to show that worsted is technically and scientifically a species of wool. This is a proposition which nobody has ever denied. But as this Court said in American Net and Twine Co. vs. Worthington, 141 U. S., 468:

> " It is a cardinal rule of this Court that, in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification *without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied.*"

For over half a century wool and wosted have been recognized as distinct articles for tariff purposes, and are still so distinguished in the present Tariff Act, in which they are referred to as distinct materials in paragraphs 280, 281, 283, 284, 285 and 286. A like distinction is to be found in paragraphs 391-398 of the Tariff Act of 1890.

The Attorney-General contends that:

> " Congress and this Court have treated *worsted not as something different from wool, but as a term more specific than wool.*"

But we fail to see how this helps him. If in this act Congress has provided in paragraph 286 for "worsted dress goods" *eo nomine*, and for the general class of articles "manufactures of wool," and in paragraph 297 has postponed the taking effect of the reduction on "manufactures of wool," how can this postponement be held to affect worsted dress goods without violating the fundamental principle of tariff construction that "*where an article is specially provided for in a tariff act, general terms in the same or a subsequent act which would otherwise include it have no application to it*, laid down in many decisions of this Court, including the following:

Arthur vs. Rheims, 96 U. S., 143.
Arthur vs. Lahey, *Id.*, 112.
Worthington vs. Abbott, 124 U. S., 433.
Robertson vs. Salomon, 130 U. S., 412.
Robertson vs. Glendenning, 132 U. S., 158.

The case of Riggs vs. Frick (Taney, 100) is instructive on this branch of the case:

> "The goods in question were composed of worsted and cotton, and the duties have been charged according to the Third Clause of the Second Section of the act of 14th July, 1832, which imposes a duty upon all manufactures of cotton, or of which cotton shall be a component part. The duties have been thus charged upon the distinction between 'worsted stuff goods' and 'woolen goods;' for *if it was supposed these goods were 'a manufacture of wool, or of which wool shall be a component part,' in the sense in which these words are used in the Act of Congress, then the duty charged might have been a much higher one than that exacted;* it must have been calculated according to the second clause of the second section, and not according to the third clause.
>
> "The description of the goods which are to pay the woolen duties, and of the goods which are to pay cash duties, are precisely the same. The Second Clause of the Second Section of the Act of 1832, among other things, provides that

the duty upon 'manufactures of wool, or of which wool shall be a component part,' shall be fifty per cent. *ad valorem;* the Fifth Section declares that 'except wool, manufactures of wool, or of which is a component part,' when the amount of duties exceed two hundred dollars, they are payable at the option of the importer, one half in three and the other half in six months; and the sixth section provides that upon 'manufactures of wool, or of which wool is a component part,' the duties shall be paid in cash. *Now, if these goods are not 'manufactures of wool, or of which wool is a component part,' within the meaning of the second clause of the second section, above quoted, which regulates the amount of duty, how can they be regarded as manufactures of that description within the meaning of the fifth and sixth sections above mentioned, which regulate the times of payment?* The language of all these clauses of the law evidently describes the same goods. And *if the goods in question are not chargeable with the woolen duties, it follows that the duties upon them are not payable in cash.*"

III. The So-called Dingley Act.

From the time of the passing of the McKinley Tariff Act, in 18 0, down to the argument of the case at bar, in 1895, the Treasury Department had never made a claim that this piece of special legislation remained in force. The claim was made in the Circuit Court of Appeals that this act was still in force, and that Court, referring to the decision of this Court in U. S. vs. Ballin (144 U. S., 1), thus disposes of the contention :

"That Court held that it was a self-executing act providing for a rate of duty on worsted cloths. In other words, *its effect was to amend the tariff of 1883 by inserting therein a provision for worsted cloths*, laying upon such cloths the same rate of duty as that tariff pre-

scribed for woolen cloths. Subsequently the McKinley Act of October 1, 1890, was passed. It contains paragraphs *covering the entire field of wool and worsted manufactures*, including woolen cloths and worsted cloths, and of course superseded the earlier tariff act of 1883, and *the Dingley Act*, which, as construed by the Supreme Court, *was simply an amendment of that act. In re* Straus, 46 Fed. Rep., 522; Kent vs. U. S., 68 Fed. Rep., 536.

"The Dingley Act therefore is no longer in force."

This ruling is in line with the decision of this Court in King vs. Cornell, 106 U. S., 395, where it is said:

"While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the later acts covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal."

See also

U. S. vs. Tynen, 11 Wall., 88.
U. S. vs. Claflin, 97 U. S., 546.
Norris vs. Crocker, 13 How., 429.

That the construction of this act by this Court was correctly interpreted by the Circuit Court of Appeals in this case, is apparent from the following language of this Court in the case of U. S. vs. Ballin, 144 U. S., 1:

"*It was an act suggested by the contest then pending in the Courts*, and which was finally decided adversely to the Government in the case of Seeberger vs. Cahn, 137 U. S., 95, in which it was held by this Court that 'cloths, popularly known as "diagonals," and known in trade as "worsted," and composed mainly of worsted, but with a small proportion of shoddy and of cotton, are subject to duty as a manufacture of worsteds, and not as a manufacture of wool, *under the Act of March 3, 1883*, C., 121.'

"The form of expression used in the act may be novel, but the intent of Congress is quite

clear. Recognizing the fact that the Secretary of the Treasury is head of the financial department of the Government, that to him, as its chief administrative official, is given the supervision of the Tariff and all the collections thereunder, it directs him to classify all worsted cloths as woolen cloths, and it gives to him no discretion. He may not classify some worsteds as woolens and others as not. There is given no choice or selection, but it is the imperative direction of Congress to him, as the chief administrative officer in the collection of duties, to place all worsted cloths, by whatever name properly known or known to the trade, within the category of woolen cloths; and, of course, if placed within that category, or, using the familiar language of the tariff, if 'classified as woolen cloths,' subject to the duty imposed on such cloths. If action were necessary by the Secretary of the Treasury to put this act into force, which was not as we think, such action was taken by the Circular letter of May 13, 1890, from the Treasury Department to all custom officers publishing the act for the information and guidance of the public.

"*Our conclusion, therefore, is* that the act was legally passed, and that, by its own terms and irrespective of any action by the Secretary of the Treasury, *the duties on worsted cloths were to be such as were placed by the Act of 1883 on woolen cloths.*"

The decisions cited by the Attorney-General are not in point. Those which relate to tariff acts arose under a system where several tariff acts were in force at the same time, and, under the rulings of this Court, were all to be considered in *pari materia*. But the Tariff Acts of 1883, 1890 and 1894 were comprehensive tariff acts, which superseded and repealed all prior tariff legislation.

See *In re* Straus and Kent vs. U. S., *supra*.

Even if the Dingley Act were still in force, it would have no application to the case at bar. It provided

simply that "worsted cloths should be classified as woolen cloths." There was an *eo nomine* provision in the Act of 1883 for woolen cloths. The act did not provide that worsted dress-goods should be classified as woolen cloths, nor that all worsted goods should be classified as wool goods. The Act of 1890 contained an *eo nomine* provision for woolen cloths, and made the duty upon them a compound *pound* and *ad valorem* duty upon them according to value *per pound*. The Collector made no attempt to classify them under this provision, but assessed them with the *compound square yard* and *ad valorem* duty provided for them according to value per square yard. *The Treasury Department has uniformly held that the term cloths is a technical trade term, and does not include dress goods* (see synopsis of decisions of Treasury Department, 9400 [1889], 10,078 [1890], 11,218 [1890]).

The decisions of the lower Courts may rest (as suggested in the concluding paragraph of the Attorney-General's brief) upon "a purely artificial and technical construction of the statute," but *it is a construction which the lower Courts took from this Court*, and which *Congress must be assumed to have taken from the same source*, and there is therefore no reason why the decision of the Circuit Court of Appeals should be reviewed by the Court whose rulings it has followed.

The petition should be denied.

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APPENDIX.

Opinion of Attorney-General on Par. 297.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., October 9, 1894.

SIR—The new rates of import duties prescribed by Section 1 of the Tariff Act of August 28, 1894, went into effect immediately, "unless otherwise specially provided for." Paragraph 297 of that act provided that "the reduction of the rates of duty herein provided for manufactures of wool shall take effect January 1, 1895." That paragraph closes Schedule "K" of the Act, whose heading is "Wool and Manufactures of Wool." The schedule does not, however, deal with wool and manufactures of wool alone. It distinguishes repeatedly between "wool, worsted, the hair of the camel, goat, alpaca or other animals." It includes also certain manufactures of flax and cotton.

You ask my opinion whether paragraph 297 refers solely to merchandise of which wool, the product of the sheep, forms the material, or whether the product of the camel, goat, alpaca or other animals is equally included.

The general intent of the act was to effect an immediate, as well as extensive, reduction of duties. To postpone the reduction in the case of any specific article, the article must be brought clearly within some exception to this general intent. *All doubts arising under the act are presumptively to be resolved in favor of the lower rate of duty*, save where the act mentions or describes the same article in two different places, under two different rates, when the higher rate governs.

"Wool," within dictionary definitions, includes the hair of the alpaca and of the Angora goat; it never is used to include all goat's hair, nor yet camel's hair, nor cow hair or horse hair. Throughout Schedule "K," except in the heading, it is undoubtedly used so as to exclude even hair of the kinds first mentioned. *Moreover, the phrase "manufactures of wool" has been given a very restrictive meaning in prior tariff acts* (Elliott vs. Swartwout, 10 Peters, 137; Seeberger vs. Cahn, 137 U. S., 95), and there is a presumption in the absence of anything to the contrary that Congress intended it still to have the same signification (Maddock vs. Magone, 152 U. S., 368, 371, 372).

If the heading of Schedule "K" were intended as an accurate and comprehensive description of its contents, the question would arise whether the heading or the contents should control, and it might be argued that hair, flax and cotton were all wool. But the heading has little significance. It is intended only for a general suggestion as to the character of the articles within the schedule (Hollender vs. Magone, 149 U. S., 586, 591; Seeberger vs. Schlesinger, 152 U. S., 581, 583). If the rule of construction were otherwise, then sponges would be either "chemicals, oils or paints," and cork would be either "flax, hemp or jute."

Moreover, it is proper to consider, as an aid to construction, the original form of the bill and the changes made by amendment. The bill, as it first passed the House of Representatives, in the same paragraph with the exception above quoted concerning "manufactures of wool," had further provisions as to "all rates of duty in the woolen schedule." The latter was stricken out in the Senate, but serves to show *that the distinction was brought to the attention of Congress.*

I am, therefore, very clearly of the opinion that the word "wool," as used in paragraph 297, refers to hair of the sheep only, and that the new duties upon articles made of the hair of other animals went immediately into effect upon the passage of the act.

You also ask my opinion whether the phrase "manufactures of wool," in that paragraph, is applicable to articles of which wool, as so defined, although a component material, is not the material of chief value. I would answer this question in the negative (Arthur vs. Butterfield, 125 U. S., 70, 75; Herrman vs. Robertson, 152 U. S., 521, 524).

Very respectfully,

LAWRENCE MAXWELL, JR.,
Acting Attorney-General.

TO THE SECRETARY OF THE TREASURY.